BOARD OF APPEALS CASE NO. 015	*	**BEFORE THE**
APPLICANT: J. Odell Jarvis and Shirley Jarvis	*	**ZONING HEARING EXAMINER**
REQUEST: Rezone a parcel 110 feet by 297 feet from VR to VB; southside of Route 23, 300 feet west of Schuster Road, Jarrettsville	*	**OF HARFORD COUNTY**
	*	Hearing Advertised Aegis: 10/17/85 & 10/24/85
HEARING DATE: November 18, 1985	*	Record: 10/16/85 & 10/23/85

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ZONING HEARING EXAMINER'S DECISION

The Hearing Examiner adopts the recitation of the facts and testimony set forth is Applicants' Memorandum as follows:

"The Applicants, J. Odell Jarvis and Shirley Jarvis, his wife, are contract purchasers of a lot containing approximately 32.373 square feet (3/4 acre) situated on the southerly side of Maryland Route 23 west of Schuster Road in Jarrettsville. The parcel was zoned R2 in 1957 and VR in 1982. Mr. and Mrs. Jarvis filed an application to have the subject property which is designated as Map 32, Parcel 304, Lot 5, rezoned from its existing Village Residential classification to the Village Business classification.

A hearing was held on Monday, November 18, 1985. Prior to the submission of testimony, the Applicants and several neighboring property owners placed an agreement on the record. The neighbors do not object to the rezoning and, in fact, support the rezoning of the subject property. The decision in this case cannot be based upon the agreement.

Mr. Odell Jarvis, one of the Applicants, stated that he operates the Jarvis Sales and Service Company which is located at 3721 Federal Hill Road in Jarrettsville, Maryland. He explained that he and his company, which is a sole proprietorship, are engaged in refrigeration and appliance sales and service. He stated that he has been in the business for fifteen years and that, prior to operating his business from its present location, it was operated from his home. He explained that he serves an area within a twenty mile radius of Jarrettsville, including southern York County, Pennsylvania, northern Baltimore County, Maryland, and Harford County, Maryland. He presently has three full-time service men and his

two sons help in the business part-time. He explained that he rents his present location but that the business has outgrown the building and he needs additional retail space. His existing building contains 1,600 square feet and the building he proposes to construct on the subject property if it is rezoned would contain 3,600 square feet. He said he anticipates he would service and sell the same appliances and serve the same general area although he hopes the volume of his business will expand, in which event he may hire several more employees.

Mr. Jarvis explained that he and his wife are the contract purchasers of the property and that the contract is contingent upon the property being rezoned VB, which would permit him to conduct his appliance sales and service business from the location. The settlement date set in the contract is January 2, 1986. The contract and addenda were introduced as Applicants' Exhibit No. 13.

Mr. Jarvis explained that, as a local businessman, he wanted land in Jarrettsville that would be suitable for the location of his business, but couldn't find any other land in Jarrettsville available for sale with the proper VB zoning classification. He said Lot 5 would be suitable for his business. He explained that the Harford County Health Department has reviewed his plans and has approved them for water and septic purposes. He said that Michael Birch, a local attorney, has examined title to the property and found no restrictions that would prevent a commercial use from being conducted on the property (Applicants' Exhibit No. 14). Finally, he stated that he believes the business as proposed would have no adverse impact on surrounding properties.

Mrs. Jean Stewart testified for the Department of Planning and Zoning. Mrs. Stewart explained that she was the author of the Department's Staff Report introduced in this case. She explained that Robert S. Lynch, the Director of the Department, reviewed the Staff Report and that it expresses the Department's position on the matter with which she agreed.

Mrs. Stewart stated she is now the staff member assigned to Planning District 8, which includes the Jarrettsville area. She explained that she has been assigned to District 8 for three months and before that time she was assigned to District 2, which includes the Churchville area. Mrs. Stewart explained that Dennis Sigler, Carol Deibel, and Arden Holdredge were previously the District 8 planners and that Mr. Sigler was the planner for District 8 during the 1982 Comprehensive Rezoning. She said that she had talked to Mr. Sigler and he was unavailable to appear at the hearing. She said that Mr. Sigler told her he did not recall his

involvement in the District 8 process and, in fact, thought another staff member had done the mapping for Jarrettsville and Planning District 8 during the 1982 Comprehensive Rezoning.

Mrs. Stewart stated that several policies of the Department of Planning and Zoning guided the 1982 Comprehensive Zoning of Village Centers, including the following:

1. Any property located within an area with the Village Center designation in the 1977 General Land Use Map was generally to be zoned either VR, Village Residential, or VB, Village Business.

2. The zoning classification assigned to a lot would follow the zoning in effect at the time of the commencement of the comprehensive zoning process in 1980 or 1981. Residentially zoned land was zoned VR and land zoned commercial was zoned VB. Rezonings that had taken place between 1957 and 1981 were considered in deciding what classification to give a property during the comprehensive zoning process.

3. Lots with existing commercial activity in the Village Centers were generally given the Village Business designation even though the lot was previously zoned residential.

4. The new zoning lines would not divide a lot into two different zoning district classifications.

Mrs. Stewart testified that the zoning maps were prepared by the staff, the actual mapping was done by a draftsperson, the maps were reviewed by the County Council, both as a whole and by the individual Councilman who represented the area of the County, and by the Director of the Department of Planning and Zoning (Guy Hager), the Deputy Director (Uri Avin), and the district planner for that district which, in this case, was Dennis Sigler. Changes to the maps were made as a result of this review process.

The subject property was zoned VR in 1982, as was Lot 7 to the east and Parcel 76 to the west. Prior to the commencement of the comprehensive zoning process in 1980 and 1981, the subject property and Parcel 76 (the playground) were zoned R2 and Lot 7 was zoned B1. Lot 7 was supposed to be zoned VB because it was zoned B1 prior to 1981 and had an existing dental office on the property in 1981.

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Mrs. Stewart stated that she had reviewed the Staff Report (Applicants' Exhibit No. 18b) and the Board of Appeals decision (Applicants' Exhibit No. 18a) in the Reichart case which had rezoned Lot 7 from residential use to commercial use in 1977. She explained that, due to a drafting error, the Reichart property was zoned VR even though an existing commercial use was located on the property and the property had been rezoned to B1 in 1977 and was still zoned B1 in 1981. This mistake was corrected by the Department and the County Council in 1983 through the adoption of Bill 83-55 (Applicants' Exhibit No. 17).

She said that, during the 1982 Comprehensive Rezoning, the Jarrettsville Elementary School property was zoned Rural Residential. She noted that Parcel 76, which adjoins the school and is also owned by the Board of Education and used as a playground for the school, was zoned VR. She testified that the playground should have been zoned RR as was the rest of the school property. She attributed the VR classification of the playground (Parcel 76) to an oversight or error which occurred because thee draftsperson was not familiar with the use or ownership of Parcel 76.

Mrs. Stewart testified that the staff of the Department had recommended denial of the requested rezoning of Lot 5 since the Department felt no mistake had been made in the zoning of the subject property and believed Lot 5 should remain zoned Village Residential. Mrs. Stewart admitted that no consideration was given to Lot 5 when Lot 7 was rezoned from VR to VB. She explained that she knew there were residences located along Schuster Road, although she was not sure exactly which lots had residences on them and admitted that she could be wrong about a house being located on Lot 8 as noted in the Staff Report.

She said that, as stated in the Staff Report, Village Residential uses were available on Lot 5 and that appropriate commercial uses could be conducted on that lot provided special exception approval was obtained. She felt that specialty shops, professional offices, and personal services were reasonable uses for the subject property. Mrs. Stewart admitted that she did not consider the provisions of Section 25-6.3(d)(3) which provides that retail trade and service uses could be conducted in the Village Residential district only when located in a building which existed at the time of enactment of the Code.

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She then explained that, in her opinion, the VB rezoning could have an impact on the school. She said that a video arcade could be located on Lot 5 if it was zoned VB and would be an attractive nuisance, although she admitted an appliance store such as the one proposed by Mr. Jarvis would not be a nuisance. She admitted that the property across the road from the subject property and designated as Parcel 288 on Map 32 is already zoned VB and is closer to the school than the subject property.

Mrs. Stewart also claimed that Lot 5 was a transition zone or buffer from the business use conducted on Lot 7 to the school property since Parcel 76 is school property although it is zoned VR. She felt Lot 5 zoned VR to act as a buffer since VR zoning is more compatible with the school than the commercial VB zoning.

Mrs. Stewart said that the VR designation of Lot 5 is consistent with the Master Plan but admitted that VB would also be consistent with the Master Plan since the lot is within an area designated as a Village Center.

Mrs. Stewart concluded her testimony by stating that she has no knowledge that the County Council specifically considered Lot 5 during the Comprehensive Rezoning and had no personal knowledge of why Lot 5 was not zoned VB.

John W. Cairnes testified as an expert real estate appraiser and broker. Mr. Cairnes testified that he was familiar with the lot in question, had reviewed the application filed by the Applicants and was present during the testimony of Mr. Jarvis and Mrs. Stewart. Mr. Cairnes, a lifelong resident of Jarrettsville, explained that Lots 5, 7 and 8 had been owned by the Watters family and were used for the sale and display of farm machinery until approximately eight or nine years ago when the lots were sold.

Mr. Cairnes stated that he is very familar with the real estate market in Jarrettsville. He said that there is no actively marketed VB property in Jarrettsville today. He explained that there is a large VB tract owned by the Jarrett family in Jarrettsville. However, he stated that the property was in trust and was not for sale. This is confirmed by the Last Will and Testament and Codicil of the late Dr. Edwin Jarrett (Applicants' Exhibit Nos. 21a and 21b). He also testified that Stanley Lloyd owns two lots that are VB on the east side of Route 165 Jarrettsville, but the lots are not for sale since Mr. Lloyd wants to build a structure and then lease space to prospective tenants. Mr. Cairnes said he owns a lot which is zoned VB and is located across the road from Mr. Lloyd's lots, but that his lot is not on the market.

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He stated that, based on his experience as a real estate broker, there is a demand for VB land in Jarrettsville. Mr. Cairnes stated that, in his opinion, rezoning Lot 5 would help satisfy the demand for VB land in Jarrettsville, but would not create an excessive amount of VB land.

He also said that residential use is not a reasonable use for the subject property. He explained that there was business use and VB zoning to the east, the school to the west, and business uses confronting the subject property on Route 23. The residential dwellings on the south side of Route 23 between the school and downtown Jarrettsville were approximately thirty to fifty years old. He explained that the last structure built as a house on the south side of Route 23 in Jarrettsville was built on Lot 7. The house is presently used by Dr. Reichart as a dental office. The house was built for speculation, but did not sell and was finally sold to Dr. Reichart contingent on getting the property rezoned to a classification that would permit him to operate his dental office from the site. He explained that the property was bought from the bank which had financed its construciton after foreclosure. Mr. Cairnes stated that, in his opinion, a house, if it were built on the subject property, would not sell at a reasonable price in view of its fronting on Route 23, a heavily traveled road, and the commercial uses across Route 23 and right next door. He also felt that there would be no adverse effect from the property being rezoned VB.

Denis Canavan testified as an expert land planner. Mr. Canavan stated that he was familiar with the mistake theory of rezoning and was present during the testimony of Mr. Cairnes, Mrs. Stewart, and Mr. Jarvis. He identified the subject property as being located on the south side of Route 23 and consisting of a lot approximately 109 feet by 297 feet for a total of approximately 32,373 square feet. He stated that the lot was rectangular in shape and was presently vacant. He testified that the closest residence to the subject property was approximately 175 to 180 feet away. Describing the surrounding properties and the uses conducted thereon, Mr. Canavan stated that, on the north side of Route 23, a commercial use was being conducted on VB property directly across from the subject property. He noted that Lot 7 was also zoned VB and was used by Dr. Reichart for his dental office. Lot 8 is vacant and zoned VR and Lots 9, 164, 52, 91, 90, and 88 are all improved by residences and zoned VR. He further noted that Parcel 76, which is owned by the Board of Education and is presently used as a playground, is also zoned VR.

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In the 1969 Harford County Land Use Plan, Lot 5 was designated for commercial use (Applicants' Exhibit No. 8a). The property is part of the Village Center designated in the 1977 Land Use Plan (Applicants' Exhibit No. 8b).

Mr. Canavan stated that, under the existing Harford County Zoning Code, the property could be used for one single-family, detached dwelling, a day care center, or kindergarten with fifteen or less children. He explained that, because of the parcel size and other requirements, no other uses could be conducted on the property. First, he pointed out that institutional uses, such as schools, require three acres and, because the subject property is less than three acres in size, such uses would not be permitted. He also pointed out that civic clubs, fraternal organizations, and community centers require a 100 foot building setback from adjacent residential lots. Since the lot in question is only 109 feeet wide, such a setback requirement could not be met. Mr. Canavan also pointed out that fire stations and hospitals also require a minimum parcel area that exceeds the area of the subject property. He noted that the same would be true with natural resources uses which also have minimum area requirements that exceed the size of the subject property.

Mr. Canavan further explained that transient housing uses would not be permitted due to the design requirements imposed by the Code. He explained that retail trade and services would be permissible as a special exception only in a building which existed in 1982. However, he stated that, because no building existed on the subject property, special exception approval for those uses is not available for Lot 5.

Mr. Canavan explained that the first draft of the 1982 Harford County Zoning Code (Applicants' Exhibit No. 15) did not require that a building be in existence on the VR lot in order to take advantage of the special exception approvals for service and retail uses. He said the Code was changed and the provision requiring that the use take place in an existing building was added at a later date. He explained that both Lot 5 and Parcel 76 were vacant lots.

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Mr. Canavan explained that he was aware that Lot 7 now owned by Dr. Reichart had been zoned B1 after the house that had been built and sat for several years. He said that, because the commercial uses were already there and the high traffic volume, it was zoned to locate the dental office and fill the vacancy. He stated that Lot 5 had many of the same characteristics as Lot 7 and that neither Lot 7 nor Lot 5 was appropriate for residential use since both experience the same impact from commercial uses and traffic.

Mr. Canavan stated that, in his opinion, the County Council made a mistake in a legal sense in not zoning the subject property VB. Lot 7 should have been zoned VB. Mr. Canavan stated that, in his opinion, Parcel 76 should have been zoned RR like the rest of the school property. He said there was no reason for Parcel 76 to be designated VR. He explained that, if the Council had been aware that Parcel 76 was part of the school property, it would have zoned that lot RR and classified Lot 7 VB and Lot 5 VB. He stated his opinion to be that the County Council would not have zoned Lot 5 VR if it had known Parcel 76 was a playground and Lot 7 was a commercial lot.

Mr. Canavan explained that the maps were drawn before the Code was drafted. He said for this reason, the Council could not have known that, if the property was vacant, commercial uses otherwise permitted in the VR as a special exception were not permitted because no existing building was located on the lot. The Council, according to Mr. Canavan, also made a mistake on Lot 7 by failing to zone it VB and corrected its mistake by adopting Bill 83-55.

Mr. Canavan stated that, in his opinion, there was adequate separation of lots and uses on Lot 5 and the surrounding properties. He pointed out that the adjoining properties are oriented towards Schuster Road away from the subject property. He explained that the rear yard requirements of the Zoning Code would provide an adequate buffer and that no adverse impact would result to adjoining properties if the property was rezoned from VR to VB.

Mr. Canavan also said that the Village Business classification and appliance sales and services would be needed to serve the Jarrettsville community. He said that, although motor vehicle repair uses could cause problems, they cannot be located on the subject property due to their proximity to the school's driveway and the distance requirement of the Zoning Code. He also pointed out that state law would prevent a liquor license from being granted to sell alcoholic beverages

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from the subject property due to its proximity to the school. Mr. Canavan said, in his opinion, the VB designation would be consistent with the Master Plan.

Mr. Canavan reviewed the Staff Report and said, in his opinion, he did not feel that the lack of a ten foot buffer yard was a valid reason to deny the rezoning. He said the setback requirement required in the Village Business district would be more than adequate. He also said that the logical place to stop VB zoning along the south side of Route 23 in Jarrettsville would have been Lot 5. He said there was no reason to fear that VB zoning would go past Lot 5.

The thrust of the Applicants' argument that there was a mistake is set forth in the Applicants' Memorandum as follows:

1. The Harford County Council did not know or realize that Lot 7 contained a dental office and was zoned B-1 prior to the comprehensive zoning process. The Council erroneously zoned Lot 7 as VR. The County Council later discovered its mistake and corrected that mistake by the adoption of Harford County Council Bill 83-55 (Applicants' Exhibit No. 17), which rezoned Lot 7 from VR to VB.

2. The Harford County Council did not realize that Parcel 76 belonged to the Board of Education of Harford County and was used as a playground in conjunction with Jarrettsville Elementary School. Although the Council zoned Jarrettsville Elementary School and the sports complex to the west of Jarrettsville Elementary School as RR, Rural Residential, the County Council zoned Parcel 76, the playground, as VR. Mrs. Stewart stated that the only reason for zoning the playground VR when the rest of the school property was zoned RR was due to oversight. She testified that the person who mapped this area must not have been aware of the ownership and use of Lot 7 and Parcel 76.

3. The County Council did not realize that the subject property was vacant and that under the newly drafted and adopted Zoning Code, the service and retail uses would not be allowed because the new Zoning Code required that these uses would only be permitted in an existing building pursuant to Section 25-6.3(d)(3) (page 86) of the Code. Even Mrs. Stewart, who examined this case in detail while preparing the staff report, erroneously believed that the professional office, specialty shops and personal service uses could be permitted as a special exception on the subject property.

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4. Since the County Council did not recognize the ownership and uses on Lot 7 and Parcel 76, it is clear that the Council did not actually consider Lot 5 or its characteristics. The fact that Lot 5, due to its size, dimensions and proximity to Jarrettsville Elementary School, is limited to one single-family residence, a daycare center or a kindergarten is further evidence of mistake. The Council obviously did not know that Lot 5 is the only vacant lot fronting on Route 23 in Jarrettsville between the school and Route 165.

In Agneslane, Inc. v. Lucas, 247 Md. 612 (1966) the Court stated:

"The burden of proof facing one seeking a zoning reclassification is quite onerous. In Shadynook Improvement Assn. v. Molloy, 232 Md. 265, 269, 192 A. 2d 502, 504 (1963), Chief Judge Brune, speaking for the Court, stated the burden thusly:

> "* * * there is a strong presumption of the correctness of original zoning and of comprehensive rezoning, and that to sustain a piecemeal change therefrom, there must be strong evidence of mistake in the original zoning or in the comprehensive rezoning or else of a substantial change in conditions."

In Boyce v. Sembly, 25 Md. App. 43 (1975), the Court stated:

"A perusal of cases, particularly those in which a finding of error was upheld, indicates that the presumption of validity accorded to a comprehensive zoning is overcome and error or mistake is established when there is probative evidence to show that the assumptions or premises relied upon by the Council at the time of the comprehensive rezoning were invalid. Error can be established by showing that at the time of the comprehensive zoning the Council failed to take into account then existing facts, or projects or trends which were reasonably foreseeable of fruition in the future, so that the Council's action was premised initially on a misapprehension. Bonnie View Club v. Glass, 212 Md. 16, 52-53, 217 A. 2d 647, 651 (1966); Jobar Corp. v. Rodgers Forge Community Ass'n., 236 Md. 106, 112, 116-18, 121-22, 202 A. 2d 612, 615, 617-18, 620-21 (1964); Overton v. County Commissioners, 255 Md. 212, 216-17, 170 A.2d 172, 174-76 (1961); see Rohde v. County Board of Appeals, 234 Md. 259, 267-68, 199 A.2d 216, 218-19 (1964). Error or mistake may also be established by showing that events occurring subsequent to the comprehensive zoning have proven that the Council's initial premises were incorrect. As the Court of Appeals said in Rockville v. Stone, 271 Md. 655, 662, 319 A.2d 536, 541 (1974):

> 'On the question of original mistake, this Court has held that when the assumption upon which a particular use is predicated proved, with the passage of time, to be erroneous, this is sufficient to authorize a rezoning."

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See Rohde, supra, at 234 Md. 267-68, 199 A.2d 220-21; England v. Rockville, 230 Md. 43, 45-47, 185 A.2d 378, 379-80 (1962); Pressman v. Baltimore, 222 Md. 330, 338-39, 160 A.2d 379, 383 (1960); White v. County Board of Appeals, 219 Md. 136, 144, 148 A.2d 420, 423-24 (1959); cf. Dill v. The Jobar Corp., 242 Md. 16, 20-21, 24, 217 A.2d 564, 567-68 (1966); Marcus v. Montgomery County Council, 235 Md. 535, 540-41, 201 A.2d 777, 780 (1964); Offutt v. Board of Zoning Appeals, 204 Md. 551, 558, 105 A.2d 219, 221-22 (1954); Wakefield v. Kraft, 202 Md. 136, 144-45, 149, 96 A.2d 27, 30 (1953); Hoffman v. City of Baltimore, 197 Md. 294, 307, 79 A.2d 367, 373-74 (1951).

It is presumed, as part of the presumption of validity accorded comprehensive zoning, that at the time of the adoption of the map the Council had before it and did, in fact, consider all of the relevant facts and circumstances then existing. Thus, in order to establish error based upon a failure to take existing facts or events reasonably foreseeable of fruition into account, it is necessary not only to show the facts that existed at the time of the comprehensive zoning but also which, if any, of those facts were not actually considered by the Council. This evidentiary burden can be accomplished by showing that specific physical facts were not readily visible or discernible at the time of the comprehensive zoning, Bonnie View Club, supra, at 242 Md. 48-49, 52, 217 A.2d 649, 651 (mineshaft and subsurface rock formation); by adducing testimony on the part of those preparing the plan that then existing facts were not taken into account, Overton, supra, at 225 Md. 216-17, 170 A.2d 175-75 (topography); or by producing evidence that the Council failed to make any provision to accommodate a project, trend or need which it, itself, recognized as existing at the time of the comprehensive zoning, Jobar Corp., supra, at 236 Md. 116-17, 202 A.2d 617-18 (need for apartmetns). See Rohde, supra, at 234 Md. 267-68, 199 A.2d 221. Because facts occurring subsequent to a comprehensive zoning were not in existence at the time, and, therefore could not have been considered, there is no necessity to present evidence that such facts were not taken into accounty by the Council at the time of the comprehensive zoning. Thus, unless there is probative evidence to show that there were then existing facts which the Council, in fact, failed to take into account, or subsequently occurring events which the Council could not have taken into account, the presumption of validity accorded to comprehensive zoning is not overcome and the question of error is not "fairly debatable." (Emphasis supplied)

In Hoy v. Boyd, 42 Md. App. 527 (1979), the Court ruled that the error must relate to the comprehensive zoning ordinance and not to the water and sewer plan or the master plan. The Court also noted that the "evidence before the zoning authority to support a reclassification based upon mistake must establish that the mistice was 'basic and actual' and made 'at the time' the property was zoned." The mistake must also relate to the specific property for which the zoning is sought and may not consist of generalities."

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In Hoy v. Boyd, supra, the Court held that change in the water and sewer plan was not a mistake sufficient to justify a rezoning.

In Howard County v. Dorsey, 292 Md. 351 (1982), the Court acknowledged that an error in the master plan is not sufficient to establish mistake in the zoning.

In the instant case, there appears to be no dispute that the County Council did not realize that Lot No. 7, the adjacent parcel, was zoned B-1. The Department of Planning and Zoning has acknowledged that Lot No. 7 was not "recognized" when the 1982 Zoning Maps were drafted.

Jean Stewart testified that the Department of Planning and Zonign would apply either a VB or VR classification in the Village District. She noted that if the property was rezoned between 1957 and 1981, then the property would have retained its zoning. She stated that if the property was used as a commercial business, it would have retained its zoning.

In 1977 the Board of Appeals granted a rezoning of Lot No. 7 from R-2 to B-1, based upon a change in character of the neighborhood. The Department of Planning and Zoning had recommended that Lot No. 7 be rezoned to B-1.

With regard to Lot No. 76, Jean Stewart stated that it was "looked at as a school site." She stated that there was no indication that it "belonged to the Board of Education." She admitted that "they thought Lot No. 76 was residential."

Despite the mistakes with regard to the surrounding properties, the Department of Planning and Zoning maintains its position that no mistake occurred during the comprehensive zoning. They assert that a rezoning of Lot No. 5 to VB may have an impact on Board of Education property. Jean Stewart pointed out that Village Business classification provides for only a 10 foot setback. She noted that video arcades would be permitted in the VB district and would be an attractive nuisance to school children. The Department contends that Lot No. 5 be a transition between Lot Nos. 7 and 76. According to Mrs. Stewart, Lot No. 5 is a buffer in that it "serves as a compatible use to an institution rather than a business use." She also admitted that the County Council not consider this lot "specifically" during the 1982 Comprehensive Zoning.

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The Hearing Examiner can neither recreate the 1982 Zoning process nor speculate as to the eventual outcome of the zoning of this property if all the facts had been known. The Department of Planning and Zoning could have recommended a VR classification for the property and may have successfully convinced the County Council. On the other hand, the owners may have presented sufficient argument to prove to the County Council that the property should be zoned VB. What the County Concil would have done in the "heat of the debate" and in the atmosphere that prevailed at the public hearing would only be speculation. The Hearing Examiner is convinced that the Department of Planning and Zoning could have recommended VR for this property but that does not mean, a fortiori, that the Council would have adopted the recommendation.

It is clear from the testimony of the Appicants and their witnesses and the Department of Planning and Zoning that the County Council simply did not have all the correct facts relative to this property sufficient to arrive at a conclusion. The Council's decision was made with facts which were presented to it. Some facts were in error, others omitted. Mistakes occurred during the comprehensive zoning which affected the Council's determination.

Firstly, there is evidence from the Department of Planning and Zoning that the Council did not specifically consider the property. Secondly, the adjoining Lot No. 76 was thought to be residential. Thirdly, the adjoining Lot No. 7 was omitted and thus was not considered by the Council as commercial. These mistakes were both actual and basic. For these reasons, this case is distinguishable from cases such as Howard County v. Dorsey, supra, and Hoy v. Boyd, supra, in which no evidence was presented with regard to the mistake in the zoning. There is evidence to support a mistake in the zoning. The testimony of the Applicants' expert witness supports this conclusion. Denis Canavan stated that according to the Harford County Land Use Plan of 1969, Lot No. 5, the subject property, was designated for commercial use and was part of the Village Center in the 1977 Land Use Plan. He stated that because of the size of the property, it could only be used as a residence, a day care center, or a kindergarten. He elaborated on the number of uses which could not be permitted on the property. He then stated his opinion as to why the property should be zoned VB. His testimony is more specific than the expert testimony which was rejected by the Court in Howard County v. Dorsey, supra. In Howard County v. Dorsey, the Court stated:

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> "That Board was "of the opinion that the parcel in question probably should have been zoned in [an industrial] classification" because "the parcel in question is practically surrounded by industrial zoning classifications." This was the only reason offered to support this conclusion. In addition, the owner testified that the subject property was unsuitable for residential development becuase of its physical location. He offered no other reason for his conclusion. A witness qualified in the field of planning, after describing the subject property and its environs, testified that it was a mistake to classify the subject property in the R-12 zone because "the property is surrounded by industrial." This was the only reason offered to support his conclusion.
>
> The evidence adduced was insufficient to make the question of "error" or "mistake" fairly debatable for two reasons. First, because the conclusion that the subject property was unsuitable for residential development was not supported by adequate reasons or facts, it was entitled to little if any probative value. It wass not sufficiently strong and substantial to overcome the presumption of validity of the comprehensive zoning. Secondly, there was no evidence to show that at the time of the comprehensive zoning the Council was unaware of the readily visible physical characteristics and location of the subject property and failed, in fact, to take them into account. Thus, there was no evidence to show that the initial premises of the Council with respect to the subject property were incorrect and that consequently the classification assigned at the time of the comprehensive rezoning was improper."

In the instant case, facts have been adduced to support the expert's conclusions. There also was in this case evidence that the County Council did not specifically consider this property. Additionally, the records support the conclusion that the "initial premises of the Council with respect to the subject property were incorrect." The information presented to the Council as to the surrounding properties was in error.

The Council's decision to zone this property was based upon mistake. The Department of Planning and Zoning propounds sound argument that may have convinced the Council to zone the property VR. However, the Council did not have the opportunity to give this matter proper review. Although the Maryland Court of Appeals disregards the mere conclusion a mistake occurred simply because the zoning of surrounding properties is not compatible with the subject tract, there is sufficient evidence in this case to indicate that the property should have been zoned VB.

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It should further be noted that the Applicants have voluntarily agreed to restrict the use of their property and that the adjoining property owners have not objected to the requested rezoning.

The Hearing Examiner recommends that the Parcel 304, Lot 5, Map 32 be zoned Village Business (VB).

Date January 6, 1986

Gregory A. Rapisarda
Zoning Hearing Examiner